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Brief of Smith for D. E.

Filed Feb. 18, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

QUINCY A. SHAW,
Plaintiff in Error,
vs.
MURRAY M. KELLOGG,
Defendant in Error.

No. 154.
(16252.)

Supplemental Brief for Defendant in Error.

JOHN R. SMITH,
Attorney for Defendant in Error.

F. C. REID & CO., PRINTERS, 1409-11 LAWRENCE ST., DENVER.

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In response to the supplemental brief and argument filed for plaintiff in error, and by leave of Court, we herewith present this additional brief, with special reference to the statements made in the supplemental brief for plaintiff in error, and by reason of the filing in this Court of the complete record of the case. The record references in this brief are to the printed record in this Court. Those in our first brief refer to the pages of the certificate heretofore printed in this Court, said certificate being reprinted on pages 160 to 182 of the complete record.

Counsel for plaintiff in error, in their supplemental brief, present what they call a chronological statement of the facts shown by the record. In such statement we believe there are material errors and omissions, rendering the statement mis-

leading, and giving a very one-sided view of the questions to be determined by this Court. The method of such statement, however, seems a proper one to follow.

Before entering upon a review of it, we desire to call the Court's attention to the fact that this case was determined in the trial Court upon the proofs offered by the plaintiff alone; that no proof was offered or required on behalf of the defendant, and that for this reason there are a number of matters of minor importance now magnified by counsel, which would obviously have been fully met and contradicted or explained had defendant's case been gone into. In no instance do such matters go to the vital questions in the case, but are all used by way of involving so-called equities in favor of the plaintiff in this legal action of ejectment.

The complete transcript of record brought into this Court by its writ of certiorari does not present, as we view it, any new questions of law, as applicable to the record title of the plaintiff in error, to Baca Grant Number 4, but it does present all the facts surrounding the inception and creation of that title, so far as the most diligent effort of counsel, taking ample time for preparation, could procure them, and we ask of this Court that the record title upon which plaintiff must stand or fall shall be weighed and determined in the light of all these facts, because the grant—the act of Congress of June 21, 1860—was not only a grant, but was a law, binding alike upon grantor and grantee, and to be faithfully kept and observed

by both parties, and if such law ws not so observed and the record presented by plaintiff shall prove such to be the case, we shall confidently ask of this Court an affirmance of the judgment below in our favor.

I.

The Record Title.

June 21, 1860. Act of Congress, declaring it lawful for the Baca heirs to select a quantity of vacant land not mineral, to be located by them in square bodies not exceeding five in number, directing the Surveyor General to make survey and location of the lands so selected when required by the Baca heirs. "The right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act and no longer." (Record, page 28.)

Feb. 17, 1862. Enter Gov. Gilpin. On this date, John S. Watts conveys one of the five grants to William Gilpin. (Record, page 60.)

Dec. 12, 1862. Watts files the so-called selection of Grant No. 4, as attorney for Baca heirs. (Record, page 32.) The boundaries of such selection rest wholly upon the ascertainment of "a point on the eastern edge of the Valley of San Luis where the thirty-eighth parallel of north latitude crosses the base of the Snowy Range, dividing the waters of the rivers Arkansas and Del Norte." The land is stated to be vacant and not mineral and to be located for purposes of arable and pastural agriculture. This selection, though nominally made by Watts, was plainly

under Gov. Gilpin's direction, as he had bought it nearly a year before.

Feb. 5, 1863. Surveyor General of New Mexico certifies to the filing of such selection by Watts, and to its number and acreage. (Record, page 31.)

Feb. 24, 1863. Surveyor General Case reports the receipt of a copy of the Watts selection of December 12, 1862, and states the description as "beginning at a point (?) where the thirty-eighth parallel of north latitude crosses the base of the Snowy Range," etc., and then adds: "I suppose this selection has been made by ex-Gov. Gilpin, as he told me last summer he was in possession of one of the Baca 'floats,' and should locate it as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains." (Record, pages 32 and 33.)

March 13, 1863. Commissioner Wilson acknowledges receipt of Surveyor General Case's letter of February 24, 1863; states that before the application can be approved, it must be accompanied by the certificates of the Surveyor General and the Register and Receiver that the land selected is vacant and not mineral; that the character of the location as to minerals must be carefully ascertained, especially after the important statement of Gov. Gilpin, communicated in such official letter. (Record, page 33.)

At this point the record is complete as to everything which had been done within the three

years limited by the Act of Congress, and it clearly appears that the only act done by or on behalf of the Baca heirs within that time was the filing of the so-called selection of December 12, 1862, and that the only possible identification of the land selected rested absolutely upon the designation, either by parties interested or by the Government, of a point where the thirty-eighth parallel of north latitude crossed the base of the Snowy Range, and we insisted upon the trial, and we insist now, that so indefinite a description did not select the land, did not, and could not, in the nature of things, charge the Government or the public with knowledge of its location, or enable either the Government or the parties to ascertain and determine whether the lands were either vacant or non-mineral. We shall recur to this later on.

Oct. 3, 1863. Gov. Gilpin makes application for survey of Grant No. 4. Surveyor General's letter (page 34) shows that the public surveys had not been extended near this land, and would not be for some time to come. It was also stated that in case of the non-approval of the contract with the deputy surveyor, the survey would be considered private, and not official; and November 2, 1863, Commissioner Edmunds expressly disapproves the contract with Deputy Surveyor Sheldon. In the meantime, the survey had been made, being completed on November 4, 1863. The date referred to in the Commissioner's letter, "13th

March, 1860" (record, page 35), is an obvious misprint, and should be "13th March, 1863." (See record, page 33.)

Dec. 5, 1863. Two certificates of the non-mineral character of this land were made similar in form, one signed by Surveyor General Pierce, and one by the Register and Receiver of the Land Office. The first of these certificates was transmitted to Commissioner Edmunds on December 12, 1863; the other certificate by the Register and Receiver does not appear in the case until February 26, 1864 (record, page 39), and was not received by the Surveyor General until March 29, 1864 (record, page 52), which was two weeks after the qualified approval of the plat and survey.

Jan. 16, 1864. The non-mineral certificate of the Surveyor General was on this date expressly disapproved (record, page 37), and his reasons for making it expressly declared insufficient.

Feb. 12, 1864. Commissioner Edmunds authorizes the qualified approval of the plat and survey. (Record, page 38.) "The original field notes duly verified and authenticated must be filed in the Surveyor General's office at Colorado. Upon bringing these to the usual satisfactory tests and finding the same all regular and correct, you are authorized, in virtue of the aforesaid sixth section of the said act of the 21st June, 1860, to approve the said survey, but in this certificate of approval you will add the special reservation stipulated by the statute—but not to embrace min-

eral land—nor to interfere with any other vested rights, if such exist. The statute does not order the issue of the patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will, therefore, constitute the evidence of title."

May 4, 1864. Commissioner Edmunds acknowledges receipt of transcript and field notes of the survey of grant No. 4. (Record, page 53.)

May 1, 1864. The Baca heirs convey to John S. Watts. (Record, pages 53-59.)

Nov. 6, 1877. Conveyance from Watts to Gilpin under decree of Court pursuant to the contract of February 17, 1862. (Record, pages 60-66.)

Dec. 10, 1883. Deed from William Gilpin to George H. Adams. (Record, pages 67-69.) This deed recognizes the existence of the mining property in controversy known as the "Eastern Star Lode" and of other mining properties. (Record, page 68.)

March 15, 1887. Deed from George H. Adams to Quincy A. Shaw, plaintiff in error, (record, pages 70 and 71.) This deed also recognizes the existence of the mining property in controversy by name and reference to an outstanding leasehold interest therein.

II.

Facts Relating to the Occupancy of Baca Grant No. 4.

—— **1869.** There is not the slightest evidence in the record of any use, or occupation of

this grant for pastural or agricultural purposes, by the grantors of plaintiff in error or any one else, prior to 1869. In 1874 some portion of the land would seem to have been leased for ranch purposes (record, page 75), and since that date the witness George H. Adams, a former owner, has resided thereon either as lessee, owner or manager.

—— **1876.** A considerable number of miners are prospecting and mining in the mountains and upon this ground. At this time the exterior lines of the grant for two miles and a half at the east end of the north line, and eight miles and a half at the north end of the east line had not been run, marked or surveyed, nor had the grant been fenced, and no one, including the occupant Adams, knew where the true lines of the grant were. As early, at least, as 1876, the evidence shows a considerable number of miners on the grant, and the Eastern Star Mine was located by three locators in April, 1876. (Record, pages 9–80–81.)

1876–1893. The possession has at all times been concurrent by the miners and the grant claimants from 1876 to the institution of this suit, the miners holding the mineral land and the grant owners the pastural and arable land. (Record, pages 74–77.)

Taxes. By the payment of local taxes, the plaintiff in error has been enabled to retain possession of almost this entire grant and of all the agricultural, pastural and arable land thereon, and to appropriate all the income and profits therefrom.

III.

Facts Relating to the Possession of the Eastern Star Mine Since 1876.

April 24, 1876. Date of discovery, as shown by location certificate. (Record, page 8.)

It is obviously unfair to assume to give a summary, or any, statement of the rights of defendant in error in the Eastern Star Mine upon this record, for the reason that such rights have not been tried, heard or determined or any testimony been called for with respect to them. This is an action of ejectment, resting on the strength of plaintiff's title, and judgment for the defendant was entered on plaintiff's proof for want of title in the plaintiff, at both trials.

The record (page 9) in the verified answer of defendant shows that instead of the property being abandoned, it has been in the continuous possession of the locators or their successors in interest to the present time, and that at least $100 worth of labor or improvements have been made or performed on said mine, in each and every year from 1876 until the present time, and when the annual labor is performed, there is and can be no abandonment in the legal sense, whether there is actual possession continuously during all the time or not, and plaintiff's own testimony shows that when not being worked, the mine has been kept locked up by defendant in error. (Record, pages, 75 and 85.)

On page 6 of the supplemental brief for plaintiff in error, it is stated that in 1885 this property

was abandoned by the lessee, and that in 1887 a verbal lease was granted to defendant in error Kellogg, and that in 1888 a second lease was refused, and that thereafter the property was invaded and plaintiff ousted. The record, on the contrary (pages 73 and 74), shows by the evidence of the witness Adams himself that the property leased was not the mine, but was a stamp mill which had been for many years before that time upon the grant, and which had been turned over to Mr. Adams, and there is not the slightest warrant in the record for the statement that these so-called leases related to the Eastern Star Mine.

IV.

As to the Mineral or Non-Mineral Character of the Land in Controversy.

Dec. 12, 1862. The statements of John S. Watts for the Baca heirs states that the land is "not mineral." (Record, page 32.) At this time, Gov. Gilpin was the owner of the grant, had contracted to purchase it on February 17, 1862, and the Watts selection of December 12, 1862, was obviously made under his direction and in his interest. Before the selection was made, Gov. Gilpin had stated to Surveyor General Case that he was "in possession of one of the Baca 'floats,' and should locate it as this is located for the reason that, in his opinion, it would cover rich minerals in the mountains." (Record, page 33.)

Feb. 24, 1863. Surveyor General Case officially notifies Commissioner Edmunds of the state-

ment above quoted, made to him by Gov. Gilpin, as being made *last summer*, the summer of 1862.

Nov. 28, 1863. Surveyor Sheldon reports that he saw no indications of the precious metals. (Record, page 50.) The Sheldon survey was made in twelve days—October 22 to November 4, 1863. (Record, pages 39–49.) It was made under Gov. Gilpin's personal supervision. In that time three men ran thirty-nine and one-half of exterior lines in the winter, with their work rendered incomplete by heavy snows, and set half-mile posts along such exterior lines, with pits, mounds and stakes, and they obviously had no time to look for precious metals if they desired to do so.

Dec. 5, 1863. The Register and Receiver and the Surveyor General certify that the land is not mineral. (Record, pages 35 and 36.) We have already stated the facts about these certificates. That of the Surveyor General was expressly disapproved January 16, 1864, and no further one made or approved and the other was not received or seen by the Surveyor General until long after he had approved the plat. No Surveyor General has ever certified that this land is non-mineral, and such certificate, after due and proper proof, was made an essential requirement of the passing of title from the Government, from the first letter of July 26, 1860 (record, page 30), down to the final approval of the plat under the authority of the letter of February 12, 1864.

V.

Did the Land Department Adjudicate, in 1864, the Question Whether the Land Selected was Non-Mineral Land?

This is a question of fact. We have discussed it upon the record quite fully in our former brief, but the ingenious selection of acts and phrases made by counsel for plaintiff in error in subdivision 5 of their supplemental brief demands its re-examination. A conclusive answer to the question would seem, under the ordinary rules of language, to be found in the final instruction from the Commissioner of the General Land Office in his letter of February 12, 1864, by which the Surveyor General was authorized to approve the plat and survey, and therein instructed to insert "the special reservation stipulated by the statute—but not to embrace mineral land."

This letter does more than show what the Commissioner's decision was as to the thing which should be done, because it also clearly shows what the Commissioner's construction of the statute was at that time and constitutes not only an answer to the proposition so strenuously urged that the Land Department then determined this land to be non-mineral, but is also an answer to the oft repeated suggestion throughout the case, that the Commissioner must have construed the statute to refer only to known mineral land. The Commissioner expressly names it as a reservation and treats it not as a question to be adjudged by the Department, but as a reservation to be enforced

in the absence of the conclusive proof which had been before that time called for by him. If such proof had been furnished, and the question in fact adjudicated, there could certainly be no reason for inserting in the document which he then declares to be plaintiff's evidence of title, the special reservation stipulated by the statute, "but not to embrace mineral land." If any adjudication can be drawn by inference from these final acts constituting the evidence of title, it is, on the contrary, an adjudication that such facts as had come to the knowledge of the Department disclosed within that area the existence of mineral lands, and that, therefore, the Commissioner felt it to be his duty, if the approval of the plat was allowed at all, to allow it only with the express reservation stipulated by the statute. The matter was plainly dealt with by the Commissioner and such decision as he made was plainly made and the authority which he gave was plainly given, because of his being advised, and it having appeared that within the area claimed there was mineral land. He had no control over the applicants, could make no selection for them, could do nothing under the law but survey and locate the lands pointed out to him by the Baca heirs, but what he could, and did do, was to put into their evidence of title the special reservation stipulated by the statute, that such title should not embrace mineral land, and they were charged from that time on with notice of such reservation.

Counsel for plaintiff in error argue that because the right of selection on the part of the

Baca heirs was limited to three years, such period was clearly allowed, both for the purpose of enabling the grantees to find vacant and non-mineral land which they could take under the act, and also to operate as a limitation upon the Government, requiring them to determine within such three years whether the land so selected was of the character which could be taken, and that if it was within three years found to be vacant and not mineral, the title should pass absolutely to the grantees. If such be the true construction of the law, the representatives of the Baca heirs succeeded in completely defeating its operation. During the three years next after June 21, 1860, the only act done by them or in their behalf was the filing on December 12, 1862, of the so-called selection. (Record, page 32.) Had such selection been definite and certain, it would have left to the Government but six months in which to ascertain and determine the character of the land. But, in fact, it did not designate with even reasonable certainty the portion of the public domain which it was intended to take. Even assuming the starting point—the base of the Snowy Range—to be a definite and certain point, the land selected for a distance of four and a half miles east from that point would necessarily lie up and upon the side of a range of mountains, and was selected in winter, far outside of the lines of the existing public surveys, in territory which, so far as the record shows, had not been explored or reported upon by any Government authority, and, at the very best, the time and character of such selection could have

left to the Government but a few short weeks after the departure of the winter snows in which to ascertain and determine the character of the land. But we insist that this question goes deeper than that and cuts to the root of the title claimed by plaintiff in error. The only rights which the Baca heirs could have, rested under the statute upon a definite selection of the lands by them within three years.

By the act of Congress of June 21, 1860, the right granted to the heirs of Baca was to "continue in force during three years from the passage of this act and no longer." The right granted was "to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number." If exercised at all, this right to select was exercised by the filing with the Surveyor General of New Mexico, on February 5, 1863, on an application by John S. Watts, as the attorney of said heirs, dated December 12, 1862, and stating that he has "this day selected" a tract of land, described as follows:

"Beginning at a point on the eastern edge of the Valley of San Luis, *where the thirty-eighth parallel of north latitude crosses the base of the Snowy Range, dividing the waters of the Rivers Arkansas and Del Norte;* thence east along said parallel four and one-half miles; thence south along a meridian line twelve miles, thirty-six (chains) and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty four links distance; thence north to the said specified parallel of latitude; thence east with said parallel to the place of beginning."

To the introduction of this application as a part of the evidence on behalf of plaintiff, counsel objected, basing such objection upon the ground that the so-called selection of the land was void for the reason that the initial corner, as the "base of the range" was not a sufficient description to identify the land, and that no further acts of identification of any kind or nature were had or done within the three years limit provided by the act of Congress.

It is conceded by counsel for plaintiff in error that the above quoted selection of December 12, 1862, filed February 9, 1863, is the only act or thing done under said act of Congress within the three years, and we now insist that the said selection did not select, because it did not identify, with any degree of certainty whatever, the land selected. The initial point is wholly indefinite. The intersection of a parallel of latitude with the base of the Snowy Range can no more furnish, with certainty, a starting point for a tract twelve and one-half miles square, than it can for a town lot, and the proof in the case, and contained in the record, conclusively shows that the base of the range, if the beginning of an abrupt ascent is to be taken as such base, is at least a mile and one-half further into the mountain than where the initial corner, in fact, is, and that going east upon the thirty-eighth parallel, into the mountains, the ascending grade for 6,000 feet, and upwards, is actually less than it is to the west of the initial corner. (Record, pages 121, 139.) It is a familiar principle that an act of Congress granting land is to be strictly

construed against the grantee, and that there must be strict compliance with its requirements, and an ample period was afforded to the heirs of Baca to select and designate their land upon the ground, so that all the world might, within the three years provided by law, know what lands they had selected. The Commissioner of the General Land Office, in transmitting to the Surveyor General of New Mexico, in July, 1860, official information of the act of Congress, and his duties under it, plainly stated the duty of the Baca claimants in this regard. He said: "Should the Baca claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications, to be filed in your office, as will enable the Deputy Surveyor, when he may reach the vicinity of such selections, in the regular progress of the surveys, to have the selections adjusted, as near as may be, to the lines of the public surveys which may hereafter be established in the region of those selections." (Record, page 29.) This plainly contemplated just what the act contemplated—a selection and identification of the lands within three years, not necessarily a marking of the boundaries upon the ground, or a completed survey, but such a definite starting point of their description as should make it a matter of official record, ascertainable by any person concerned in locating or purchasing public lands, and it was a limitation and a requirement, entering into the grant itself, and of the very essence of it, that within the three years the

Baca claimants should select the lands which they desired to take under the grant.

In a line of cases in the Supreme Court of the United States, arising under entries made upon military warrants, this Court was called upon to pass upon the sufficiency of the descriptions used in the entry papers for lands, and, in discussing this question, the Court said:

"It has been long and well established, as a rule of law and equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's title.

"In order to uphold and support an entry, it is incumbent on the party claiming under it to show that the objects called for in it are so sufficiently described, or so notorious, that others, by using reasonable diligence, could readily find them."

Watts vs. Lindsey's Heirs, 7 Wheat., 159.

In the case of Meredith vs. Picket, 9 Wheat., 572, the Court declared:

"That the attempt of the appellees to explain their entry and to support their survey, by depositions, cannot avail them. It is the proper province of testimony to show the notoriety and names of places, but not to explain a written instrument—that is the proper province of the Court, according to their own opinion of the words as they are found in the instrument itself, and not according to the opinion of witnesses, who may or may not be selected for the purpose."

Meredith vs. Picket, 9 Wheat., 572.

In Taylor vs. Owing, 11 Wheat., 228, the Supreme Court says:

"It is the plain dictate of good sense that an entry, to satisfy the law, must describe the place with sufficient accuracy to be found and known by others, *and in terms which will not fit other places equally well* with that intended to be appropriated."

And in Bodley vs. Taylor, 5 Cranch, 190, the Court, while sustaining the entry, declares that "the law has required, and should be content with,

that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum."

We submit that, tested by these rules and by the well settled general rules of law requiring definiteness of description, the initial point of this so-called selection was so indefinite as to furnish no notice whatever to any person of the location of the lands so selected, and, taken in connection with the conceded fact that for twenty-nine years the lines of the survey upon the ground, to the extent of eleven miles of said grant, remained wholly unclosed, unmarked, and never, in fact, surveyed, amply warrants the Court in holding that the indefiniteness of the original survey was not aided by any subsequent acts as against miners and other claimants, whose rights arose in the intervening period.

In Schulenburg vs. Harriman, 21 Wall., 62, Justice Field states the rule that "A legislative grant operates as a law, as well as the transfer of the property, and has such force as the intent of the Legislature requires." And obviously in this case the act of Congress was not only a grant to the Baca heirs, but constituted the rule of law absolutely governing their action and measuring their rights.

Giving to the "location" the broadest meaning claimed for it by plaintiff in error, and making it refer solely to the acts of the Surveyor General, it would still remain true that, under the law, the only right of selection was in the Baca heirs, and

that the duties of the Surveyor General were limited to the location of the lands selected by them. The Surveyor General could only survey and locate such lands as the Baca heirs selected, and the period within which such survey and location was to be made was in no wise limited by the act. When the selection was once properly made, and the land designated by the Baca heirs, the survey of the land might have been delayed for an indefinite period, and, in fact, the instruction to the Surveyor General, under date of July 26, 1860, and June 7, 1862 (Record, p. 34), plainly contemplated that the selection by the Baca heirs would be so definite and certain, that the adjustment of the exterior lines to the public surveys should not be made until the vicinity was reached, in the regular progress of the surveys, the act of Congress authorizing the Baca heirs to request a special survey, but not limiting the time within which they might require it. It seems plain, under this state of facts, that the selection by the Baca heirs must not only have been made within the three years, but must also have been of a certain, definite and specific tract of land while the only selection made stated the initial point as at "the base of the Snowy Range," which we insist to be far too indefinite and uncertain to identify the land.

As was remarked by Judge Hallett on the first trial of this case, it was sought in the progress of the Pacific Railroad grant cases to definitely ascertain the base of the Rocky Mountains as a point at which the grant was enlarged, and expert testimony fixed such point at various places for a

distance of one hundred and fifty miles along the line of the road.

VI.

The So-called Adjudication in the Land Office that the Title to Baca Grant No. 4 Had Passed From the Government.

The citations under the sixth subdivision of the supplemental brief of counsel for plaintiff in error rest wholly upon the letter of Commissioner Williamson, written March 21, 1879 fifteen years after the qualified approval of the plat and survey. It is the first official statement that the question as to the mineral or non-mineral character of the land has been passed upon. It was not a decision upon any application for a determination of the mineral or non-mineral character of the land, nor was there any hearing with respect thereto, or any notice to third parties, or any consideration for their rights. The letter was wholly *ex parte* and merely the opinion of the Commissioner as to the legal effect of what had happened fifteen years before, and what is of still more importance, was based upon an obvious mistake of fact, in stating as a fact that the mineral or non-mineral character of this land had been passed upon.

The second letter referred to by counsel (record, page 104) adds nothing to the letter of Commissioner Williamson because it is wholly based thereon and merely adopts the conclusions and statements of that letter. The record does show by its silence that no attempt has been at any time made by the claimants of the grant to have

the mineral or non-mineral character of the land determined by the Department. Since 1876, at least, it has been well known to be partly mineral land. During all that time since their selection, the doors of the Department have been open to them for a hearing and decision, and the Department has constantly held that it had the power and authority under this identical act to order a hearing upon that question and to make such examination and decision. The force and effect of the words in the act, "vacant land, not mineral," have been before the Department, and repeated decisions have construed the same in the line of our contention, until such construction has become the settled rule of the Department.

In Baca Float No. 3, 12 L. D., page 680, the Secretary of the Interior says:

"Independently of this, the question as to whether the mineral character of the land was or was not known to claimants at date of location is immaterial. The act of June 21, 1860, authorized the heirs of Baca 'to select instead of the land claimed by them an equal quantity of vacant land *not mineral*,' and the burden of proof is upon the claimants under said grant to show that the lands selected or located are non-mineral lands, as no title to mineral lands can vest in them under said act, and the Department may at any time before the title passes from the Government require the claimants to show that the land is not mineral, *although the character of the land may not have been known to claimants at the date of selection or location*. If upon the hearing the proof should show that the land embraced in the location is mineral, the mineral land should be segregated from the non-mineral land by survey, and the grant claimants will be entitled to such part of said location as may be shown to be non-mineral."

On motion for review before Secretary Noble, the questions were gone into still more fully, and

in addition to holding at some length that the duties of a Surveyor General under this act were at all times subject to the supervision of the Secretary of the Interior and the Commissioner of the General Land Office, the legal questions arising upon the construction of the act of June 21, 1860, are also passed upon:

"The act of Congress authorized the selection of lands of a certain character, and when the claimants presented a selection thereunder, it certainly devolved upon them to affirmatively show the lands were of the character prescribed. By presenting a selection under said law, the claimants affirmed its non-mineral character, and they must stand ready to support such allegation. I do not find that the instructions given are inconsistent with the laws of evidence, and do not, therefore, find any necessity for modifying the decision complained of in that respect. It is said that the inference is inevitable from the language of both the Commissioner and the Secretary, and, therefore, tantamount to an instruction that if any mineral land shall be found within the boundaries of the selection made, then the whole selection must be rejected. This assertion is directly denied by the following, quoted from said departmental decision:

"'If upon the hearing the proof should show that the land embraced in the location is mineral, the mineral land should be segregated from the non-mineral land by survey, and the grant claimants will be entitled to such part of said location as may be shown to be non-mineral.'

"It is further argued in support of this motion that only those lands *known at the date of the selection to be mineral lands* should be segregated from the tract thus selected, and that the discovery of minerals, in any part of said lands, made after the date of selection, cannot affect the right and title of these claimants to said lands. The decision rendered in your office limited the inquiry to the two dates, that of selection in 1863, and of the amendment of such selection in 1866. While it is not said in so many words in the departmental decision that such instructions were in error, yet it was in effect so said. The following language was used:

"'The act of June 21, 1860, authorized the heirs of Baca 'to select instead of the land claimed by them an equal quantity of vacant land *not mineral*,' and the burden of proof is upon the claim-

ants under said grant to show that the lands so selected or located are non-mineral lands, as no title to mineral lands can vest in them under said act, and the Department may at any time before the title passes from the government require the claimant to show that the land is not mineral, although the character of the land may not have been known to claimants at the date of selection or location.'

"This can be construed only to mean that the inquiry should extent to the *present known character* of the land as well as to its character as known at the date of selection. This holding is in entire accord with the principle announced in the case of Central Pacific R. R. Co. vs. Valentine (11 L. D., 238). It was there said:

"'No date is fixed in the grant at which the mineral character of the lands must be known, in order to bring them within the exception. If, in fact, mineral, they are within the exception, according to the plain terms thereof; whether their mineral character is known at the time of definite location or approval of survey, or not.'

"It is contended that the language in the acts making the grant to the railroad company is so different from that employed in the act now under consideration, that the rule laid down in the Valentine case, admitted to be right there, cannot be applied here.

"The excepting clause in the act of July 1, 1862 (12 Stat., 439), is in these words: 'Provided that all mineral lands shall be excepted from the operation of this act.'

"The act of July 2, 1864 (13 Stat., 356), contains the following:

"'And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler, or any lands returned or denominated as mineral lands,' etc.

"The act now under consideration provides that the beneficiaries thereunder may 'select, instead of the land claimed by them, an equal quantity of vacant land, not mineral'

"The evident intention in all these acts was to prevent the title to mineral lands from passing thereunder, and to express that intention the language in the act last mentioned is just as clear as that used in the others. The language used in the act under consideration should be given the same prohibitive force as is accorded the other acts mentioned."

These rulings conclusively show that the Department has both the willingness and the means

of making the examination and decision as to the character of the land, and in the case at bar the government is itself in court, declaring its position in the matter and its readiness to proceed with an examination of the lands. We insist that the question of the character of this land has never been passed upon, but was reserved under the express direction of the Commissioner of the General Land Office, both by his letter of February 12, 1864, authorizing the approval of the plat and survey, with the express direction to insert the special reservation stipulated by the statute, "but not to embrace mineral land," and the approval of the plat on March 15, 1864, by the Surveyor General in accordance with such instructions, and that such question so reserved is still open for examination and decision by the proper officers of the Department.

At the conclusion of the plaintiff's evidence upon the trial of this case, the defendant in error made the following motion, which was sustained by the Court, and as it summarizes our conclusions and the reasons for our claim, we venture to here restate it. The motion was for an instruction from the Court to the jury directing a verdict in favor of the defendant, upon the ground of the failure of sufficient proof to maintain the plaintiff's case. The grounds of the motion being:

"*First*—That there was no sufficient or proper selection of the land granted by the act of Congress of June 21, 1860, within the time limited by the act, three years from that date. That the so-called selection of Watts was void by reason of the uncertainty of the description, and that the designation of the initial corner as the base of the range was not a sufficient description to identify the

land, and that no further acts of identification or of selection of any kind or nature were had or done within the three years' limit of the act of Congress.

"*Second*—Because the act of Congress reserved all mineral land, and forbid the entry upon mineral land, and because there has never been, at any time, any form of conveyance, or any patent or deed, or any act of the Government, or of its officials, which had the effect of conveying the estate which the Government reserved by the act, to wit, mineral land of any kind. Because it is conceded by the pleadings in this case, and is shown by the proof, that the land in controversy is claimed and held by this defendant, and by his grantors, as mineral land; and that it is mineral land.

"*Third*—Because the proof of the plaintiff shows that no sufficient or proper survey of this land, or complete survey was made upon the ground until the lapse of three years after the so-called selection by Watts; that the Sheldon survey was incomplete, and remained incomplete, until the Darby survey in 1892.

"*Fourth*—We make a special objection, and as a ground of this motion, that the approval of the plat, made by Surveyor General Pierce on the 18th day of March, 1864, was expressly made subject to the provisions and conditions of the act of Congress, and because the evidence already introduced shows that a certificate of the Surveyor General that this was vacant land and not mineral, made upon December 5, 1863, was expressly, and in terms, rejected and disapproved by the Commissioner of the General Land Office in January, 1864, and no further or other certificate was ever made by the Surveyor General upon that subject.

"*Fifth*—Also, because the evidence in this case shows that the real claimant and locator of this ground, William Gilpin, located or attempted to locate this grant, in violation of the terms of the act, and in violation of its provisions and limitations, and with knowledge that he was seeking to take mineral land, and because that is shown by the record upon which the plaintiff must rely and with knowledge of which *they are* charged."

This motion the Court sustained, instructing the jury at some length, and discussing the questions involved, and stating the reasons for directing a verdict in favor of defendant. The charge of the Court is found in the printed record, at page 145.

This brief is intended as supplemental, only, and we ask in connection with it the consideration of the brief heretofore filed by us, based upon the certificate from the Circuit Court of Appeals of the United States, and also in connection with it, the consideration of the briefs filed in this case by the Government of the United States; and we respectfully ask an affirmance of the judgment of the Circuit Court of the United States for the District of Colorado.

All of which is respectfully submitted.

JOHN R. SMITH,
Attorney for Defendant in Error.